No. 96-1951

(2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET L. VAUGHT, ALAN VAUGHT,
and MITCHELL VAUGHT,
Petitioners,

v.

SHOWA DENKO, K.K.; SHOWA DENKO AMERICA, INC.;
LEINER HEALTH PRODUCTS, INC.; PHARMATIVE CORP.;
GENERAL NUTRITION, INC.; GENERAL NUTRITION CORP.;
GENERAL NUTRITION PRODS., INC.;
WALGREEN CO.; and ECKERD HOLDINGS II, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS SHOWA DENKO, K.K. AND SHOWA DENKO AMERICA, INC.'S BRIEF IN OPPOSITION

SARA D. SCHOTLAND
Counsel of Record
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

ROWLAND FOSTER
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300

Attorneys for Respondents
Showa Denko K.K. and Showa Denko America, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the court of appeals correctly applied state law to hold that the statute of limitations applicable to a personal injury claim was not tolled by the filing of a nationwide class action in federal court.

RULE 29.6 STATEMENT

Respondent Showa Denko K.K. has no parent corporation and directly or indirectly controls the following non-wholly owned subsidiaries: Fuyo Perlight K.K., Hitool (S) Pte Ltd., Hokkaido Industrial Gases Co., Ltd., Hymold (Pte) Ltd., Hymold (Thailand) Ltd., Japan Polyolefins Co., Ltd., Japan Polypropylene Co., Ltd., K.K. Toyama Air Supply, Kosai Auto Gas K.K., Kyodo Light Metal Trading Co., Ltd., Nagoya Kenmazai Kogyo K.K., Niigata Showa, Pacific Hydrogen Co., Ltd., P.T. Hymold (Indonesia), SD Gas Sales Kabushiki Kaisha, Shotic Corporation, Shotic (Singapore) Pte Ltd., Shotic America Corporation, Showa Aluminum Corp., Showa Aluminum Corporation of America, Showa Aluminum Powder K.K., Showa Denko Air Products Co., Ltd., Showa Denko Carbon, Inc., Showa Distribution K.K., Showa Engineering Co., Ltd., Showa Financing K.K., Shunan Denko K.K., Sunny Homes K.K., Taiwan Chao Yang Chemical Co., Ltd., and Tokuyama Petrochemical Co., Ltd.

Respondent Showa Denko America, Inc.'s parent corporation is Showa Denko K.K. It has no subsidiaries.

LIST OF OTHER INTERESTED PARTIES

In addition to Respondents Showa Denko K.K. and Showa Denko America, Inc., on whose behalf this brief is filed, other interested parties include the Petitioners (Janet, Alan and Mitchell Vaught) and the additional Respondents in this case, who are correctly identified in the caption. Sara D. Schotland of Cleary, Gottlieb, Steen & Hamilton, and Rowland Foster of Strasburger & Price, L.L.P. are counsel of record for Showa Denko K.K. and Showa Denko America, Inc., and Mr. Foster is counsel of record as well for the additional Respondents.

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Respondents Showa Denko K.K. and Showa Denko America, Inc. hereby oppose the writ of *certiorari* filed by Petitioners Janet L. Vaught, *et al.*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 107 F.3d 1137 (5th Cir. 1997). The opinion of the district court (Pet. App. 41-60) is not reported or available on Westlaw or LEXIS.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1997. A petition for rehearing was denied on April 8, 1997. (Pet. App. at 34-35.) The petition for writ of *certiorari* was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners seek review of the court of appeals' decision which, in applying Texas law, determined that the Texas statute of limitations applicable to personal injury claims is not tolled by the filing of a nationwide class action in federal court in another state.

A. Statement of Facts and Proceedings.

Petitioners filed suit in Texas state court on April 28, 1993. Respondents removed the action to the United States District Court for the Southern District of Texas, Houston Division. (Pet. App. at 6.) In June 1994, the Panel on Multidistrict Litigation ordered the transfer of the case to the United States District Court for the District of South Carolina, for pre-trial consolidation with the nationwide L-Tryptophan litigation pending there (MDL No. 865). (*Id.*) In September 1995, the case was remanded from the South Carolina court to the District Court for the Southern District of Texas for further proceedings and trial. (*Id.*) The respondents later moved for summary judgment on limitations grounds. (*Id.*) The district court granted respondents' motion for summary judgment on limitations grounds and that decision was affirmed by a panel of the United States Court of Appeals for the Fifth Circuit on March 10, 1997.

On appeal, the Fifth Circuit was called upon to address two state law issues involving the interpretation of Texas' statute of limitations: a question related to application

of the discovery rules (not presented in the instant petition for *certiorari*) and the question of whether under Texas law, the filing of a putative class action by a Maryland resident tolled the statute of limitations for Petitioners' state court personal injury claim.

In an L-Tryptophan case filed in Maryland, *see Rapoport v. Showa Denko America Inc.*, No. JH-90-518 (D. Md. filed Feb. 13, 1990), a motion was made for certification of a class. Certification of that class was denied by the MDL Judge to whom the case was transferred—the Honorable Matthew Perry, D.S.C. Columbia Division—on January 6, 1992. (Pet. at 5.) Petitioners rely on *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1947), a federal antitrust action, to argue that the limitations period was tolled during the time period during which the motion for class certication was pending in the *Rapoport* case. Federal courts sitting in diversity are obliged to apply state law to limitations questions. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980). The Fifth Circuit declined to apply *American Pipe* tolling to Petitioners' claims. The Fifth Circuit observed that the Texas Court of Appeals had specifically rejected class action tolling in another L-Tryptophan case. (Pet. App. at 12-13); *see Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 757 (Tex. App.—Amarillo 1995, *writ denied*).[1]

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[1] Petitioners' statement of facts is inaccurate in several respects. First, *Rapoport* was filed by a Maryland resident in federal court in Maryland, *see Rapoport v. Showa Denko America, Inc.*, No. JH-90-518 (D. Md. filed Feb. 13, 1990); the putative class action was then transferred to South Carolina, the transferee court for MDL-865, *In Re L-Tryptophan*. Second, there is no record support for the statement that Petitioner Janet Vaught refrained from filing a redundant lawsuit by virtue of "the text and spirt of Rule 23" as asserted in the Petition at p. 20. Nor is there record support for the proposition that as a result of *Vaught*, "thousands . . . of class claimants' cases are . . . prescribed." (Pet. at 10 (sic).) Nor do Respondents concede that Petitioners' action filed in April 1993 was timely under Texas' two-year statute if the filing of *Rapoport*

B. The *American Pipe* Doctrine.

In *American Pipe*, this Court held that "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' " the commencement of a class action tolls "the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 552-553, 554. The tolling doctrine thus encourages putative class members to rely on class actions and to refrain from individual actions; tolling preserves the timeliness of claims unless and until the action is denied.[2] This Court cautioned that class action tolling would apply only when the filing of a class action provided proper notice to defendants of the claims and claimants asserting them:

> [t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendant not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of

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tolled her claim. To the contrary, she still had time to file her suit after denial of class certification in *Rapoport* in January 1992, even assuming *arguendo* that tolling applied.

[2] *American Pipe* applied class action tolling to motions to intervene filed after the statute of limitations would otherwise have expired. In *Crown, Cork & Seal v. Porter*, 462 U.S. 345, 350-51 (1983), the rule was extended to the filing of separate individual actions in a "Title VII" litigation. In a third case, *Chardon v. Fumero Soto*, 462 U.S. 650, 662 (1983), also involving a federal cause of action (a civil rights claim where the federal statute provided no limitations period), this Court held that after class certification is denied, the time period for the individual plaintiff to bring suit was determined by state law (*i.e.*, state saving statutes).

> limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation.

414 U.S. at 554-555 (citation omitted). A trilogy of this Court's decisions has established that federal courts can toll statutes of limitations on *federal* law claims but these decisions do not require (or address) tolling of state causes of action such as personal injury claims.

C. The Court of Appeals' Decision.

In this case, the court of appeals observed that:

> diversity actions, such as the one at hand for product liability, involve state causes of action, where state law, of course, provides the rules of decision even in federal court. In fact, the Supreme Court has stated that generally, for diversity actions, a federal court should apply not only state statutes of limitation but also any accompanying tolling rules.

(Pet. App. at 27 (citation omitted).) Citing *Bell*, the court of appeals correctly determined that under Texas law, class action tolling applies only to property damage claims, not personal injury actions.[3] The *Bell* court had concluded:

> The basic premise of the *American Pipe* ruling is that a statute of limitations can be tolled while class allegations are pending, provided the defendant has notice of the type and potential number of the claims against it. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-94 n.14 (1977). In *Grant* [*v. Austin Bridge Constr. Co.*, 725 S.W.2d 366 (Tex. App.—Houston 1987, no writ)], the suit involved

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[3] Petitioners misleadingly cite *Bell* without observing that a writ was denied by the Texas Supreme Court, although they are aware the writ was denied; indeed, this fact was noted by Respondents in their brief before the Fifth Circuit. *See Brief for Appellees* at 4 n.2, *Vaught v. Showa Denko K.K.*, 107 F.3d 1137 (5th Cir. 1977).

> was filed in a Texas state court by plaintiffs who were a readily discernible group of people claiming injury to certain property rather than personal injury. That distinction is important in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit. For us to hold that the filing of a mass personal injury suit, in a federal court, in another state, with the variety of claims necessarily involved in such a case, entitled a plaintiff to a tolling of the limitations period such as in *American Pipe*, would be an extension not warranted by the *Grant* decision and we refuse to do so.

899 S.W.2d at 758.

REASONS FOR DENYING THE WRIT

The petition should be denied. Sitting in diversity, federal courts apply state law to determine statute of limitations rules, including tolling rules. There is no conflict among the federal circuits as none of the other courts of appeals which have considered the question of whether to apply class action tolling have applied Texas law. Further, contrary to Petitioners' claims, the Fifth Circuit's decision does not conflict with *American Pipe* which applied class action tolling in the context of a federal cause of action (antitrust litigation).

I. THE FIFTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS DECISIONS, NOR IS IT CONTRARY TO THIS COURT'S DECISION IN *AMERICAN PIPE*.

A. There Is No Conflict Among The Circuits.

Petitioners urge as their primary argument in support of review that the Fifth Circuit's decision conflicts with *Sawtell v. E.I. du Pont de Nemours & Co., Inc.*, 22 F.3d 248 (10th Cir.), *cert. denied*, 513 U.S. 917 (1994), and *Adams Pub. Sch. Dist. v. Asbestos Corp., Ltd.*, 7 F.3d 717 (8th Cir. 1993). There is no direct conflict. In

Sawtell, the Tenth Circuit found that it "need not resolve" whether class action tolling applied in a personal injury action because (1) Mrs. Sawtell was a New Mexico resident, (2) the Rule 23 class action was brought only on behalf of Minnesota residents, and (3) "Mrs. Sawtell was not a putative member of the Minnesota class action." 22 F.3d at 253. Thus, the *Sawtell* court did not apply *American Pipe* tolling, nor did the case involve Texas law. In *Adams*, a North Dakota statute expressly authorized extension of time for suits related to removal of asbestos from public buildings notwithstanding otherwise applicable limitations periods.[4] This statute provided evidence of the North Dakota legislature's intent to avoid time barring of asbestos property damage claims. *Adams* is in fact consistent with *Vaught*: the Eighth Circuit ruled that, sitting in diversity, it was obliged to apply North Dakota law, *see* 7 F.3d at 719, just as the *Vaught* court applied Texas law. Moreover, *Adams* concerned the issue of whether *North Dakota law* avoided tolling a *property damage* claim; thus the case did not concern tolling in mass personal injury litigation such as the L-Tryptophan litigation.

Accordingly, there is no direct conflict among the circuits with respect to the *Vaught* decision and the decision of any other circuit court on a matter of federal law.

B. The Fifth Circuit's Decision Does Not Conflict With *American Pipe*.

American Pipe concerned the tolling of statutes of limitations where a class action is filed with respect to federal law claims. *American Pipe* does not address the tolling of state limitations periods on state law claims. As discussed further below, nothing in *American Pipe* overrides *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which requires federal courts to apply state law on statute of limitations questions when sitting in diversity. As the Texas Court of Appeals observed in *Bell*, a case involving

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[4] *See* N.D. Cert. Code 28.01 (1993).

class action tolling of personal injury claims, state law governs class action tolling of state law claims:

> We do not agree that *American Pipe* operates to toll our state statute of limitations. That case involved an interpretation of Rule 23 of the Federal Rules of Civil Procedure and concerned the question of whether a federal statute of limitations was tolled for the purpose of filing a federal claim. Under the doctrine of the hoary case of *Erie Railroad Co.* and its progeny, where a claim is derived from state law, as is appellant's suit, state law governs the tolling of the statute of limitations.

Bell, 899 S.W.2d at 757 (citations omitted).

Moreover, the "fair notice" requirement of *American Pipe* counsels against class action tolling in mass personal injury litigation. *American Pipe* states that for class action tolling to apply, the class action must give the defendant notice sufficient to identify the evidence necessary to defend its claims. *See* 414 U.S. at 554-55. Absent the fair notice requirement, defendants would be prejudiced by class action tolling. In a concurring opinion, Justice Blackmun emphasized the central role that notice plays in *American Pipe* tolling. After warning that *American Pipe* must not be read as encouragement to file class actions solely to protect dilatory plaintiffs who are late to file suit, Justice Blackmun admonished that only plaintiffs whose claims "concern the same evidence, memories, and witnesses as the subject matter of the original class suit" should benefit from class action tolling. 414 U.S. at 562 (Blackmun., J., concurring). This way "the defendant will not be prejudiced by later intervention, should class relief be denied." *Id.*

In mass personal injury actions, the notice requirement is not satisfied and class action tolling is inappropriate. As the California Supreme Court has observed:

> [B]ecause personal-injury mass-tort class-action claims can rarely meet the community of interest require-

> ment in that each member's right to recover depends on facts peculiar to each particular case, such claims may be presumptively incapable of apprising defendants of the "substantive claims being brought against them" . . . a prerequisite, in our view, to the application of *American Pipe*.

Jolly v. Eli Lilly & Co., 751 P.2d 923, 937-938 (1988). The key facts underlying personal injury mass tort claims are unique to each plaintiff:

> The major elements in tort actions for personal injury—liability, causation, and damages—may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation.

Jolly, 751 P.2d at 936 (citations omitted).[5]

Because personal injury claims turn on plaintiff-specific facts, the MDL Court ruled in *Rapoport* that a class action was not appropriate for L-Tryptophan. Far from being compelled by *American Pipe*, class action tolling would not comport with its fair notice requirement as the filing of *Rapoport* did not give Showa Denko the identity of potential plaintiffs or enable Showa Denko to identify and preserve relevant evidence (medical providers, medical records, damages witnesses, etc.).

Accordingly, *certiorari* is not warranted on the basis that the court of appeals' decision conflicts with Supreme Court precedent.

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[5] *See also Ganousis v. E.I. du Pont de Nemours & Co.*, 803 F. Supp. 149, 155 (N.D. Ill. 1992) (noting that argument that *American Pipe* does not apply in mass tort personal injury action because defendants do not have the "requisite information about the prospective claims . . . appear[s] to have some force and [is] buttressed by some respectable authority"); 7B Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice and Procedure* § 1783 (2d ed. 1986) ("[A]llowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule").

II. THE COURT OF APPEALS' DECISION IS CORRECT.

The Fifth Circuit's decision is also correct. The court properly applied state law to determine whether Texas would toll class actions in a mass personal injury lawsuit and concluded, based on *Bell*, that the filing of *Rapoport*, a putative class action in Maryland,[6] did not toll the Texas statute of limitations.

A. Under *Erie*, Federal Courts Sitting In Diversity Must Apply State Statutes Of Limitations, Including Tolling Rules.

American Pipe was an antitrust case in which the claim arose under federal law. Post-*Erie*, federal courts may not displace state law on statutes of limitations applicable to state law claims. In *Armco Steel*, this Court held that federal courts must apply state tolling rules because they are an "integral part . . . of the state law cause of action."[7] 446 U.S. at 746. This Court observed:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

446 U.S. at 753. The rule that federal courts sitting in diversity must borrow state limitations policies compares with the *Erie* doctrine:

> If, even in areas of *choice*, federal courts unwaveringly apply state tolling rules to borrowed limitations

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[6] *Rapoport* was transferred to the MDL court in South Carolina.

[7] *See also Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980).

> periods, the existence of an *obligation* to do so when the state periods apply of their own force is compelling. Otherwise, the fortuity of diversity of citizenship would enable parties to alter, radically, the limitations periods applicable to state law claims. When a plaintiff of citizenship diverse to the defendant cannot be found, the otherwise applicable state limitations period would govern. Nonetheless, if one can be found (and since mass torts often affect many people across state lines, a search for a suitable plaintiff is often not fruitless), the state's law will be displaced by a federal tolling rule. This divergent outcome, turning solely on the availability of federal diversity jurisdiction, is intolerable under our federalism.

Mitchell A. Lowenthal & Norman M. Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 565 (1996) (footnote omitted);[8] *see Guaranty Trust Co. v. York*, 326 U.S. 99, 111-12 (1945) (federal court cannot use its equity jurisdiction to hear a diversity suit that would be barred by the state's statute of limitations if brought in state court). In *York*, Justice Frankfurter found that state limitations periods are for state law claims a significant part of the "legal rules [which] determine the outcome of litigation."[9] 326 U.S. at 109; *see also In re "Agent*

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[8] Mr. Lowenthal is counsel for Showa Denko in this action.

[9] The cases cited by Petitioners do not support their position that federal courts sitting in diversity may disregard state tolling rules. In *Tomanio*, 446 U.S. at 485, this Court held that other courts should ordinarily borrow state limitation periods including tolling rules to supply the limitation period for *federal* action when there is no specifically stated federal statute of limitations. *A fortiori*, state limitations periods should be borrowed for state class actions. *See* Lowenthal & Feder, *supra*, at 565. In *Hanna v. Plumer*, 380 U.S. 460 (1965) this Court held that the Federal Rules of Civil Procedure, rather than state law, governed the manner in which process was served. In *Armco Steel*, this Court distinguished *Hanna* and ruled clearly that "[t]here is simply no reason why, in the

Orange" Prod. Liab. Litig., 818 F.2d 210, 213 (2nd Cir. 1987) ("The limitation periods of *American Pipe* and *Crown, Cork* were derived from federal statutes. Here we are dealing with Hawaii's limitation statutes. . . . [I]t is doubtful that either *American Pipe* or *Crown, Cork* can be treated as applicable precedent."), *cert. denied*, 484 U.S. 1004 (1988). Tolling rules are an integral part of state statutes of limitations. *See Cook v. G.D. Searle & Co., Inc.*, 759 F.2d 800, 803 (10th Cir. 1985) (federal court sitting in diversity must apply state limitations period and related tolling rules (citing *Tomanio*, 446 U.S. at 485-86)).

Here, the court of appeals appropriately followed Texas law, namely, *Bell v. Showa Denko K.K.*, 899 S.W.2d at 757-58. The *Bell* court contrasted the applicability of *American Pipe* in property damage litigation following *Grant v. Austin Bridge Constr. Co.*, 725 S.W. 366 (Tex. App.—Houston 1987, no writ). *See Bell*, 899 S.W.2d at 758. As the *Bell* court noted, *Grant* involved a discernible group of people claiming property damage, not personal injury, a distinction of central importance in determining whether defendants receive fair notice by the filing of a class suit. In *Grant*, by marked contrast to L-Tryptophan litigation, the putative class was readily identifiable and the damages sought were clearly defined. *See Grant*, 725 S.W.2d at 367.[10] *Bell*'s distinction between personal

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absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." 446 U.S. at 753.

[10] *Bell* is consistent with a line of decisions which recognize that while property damages cases are appropriate for class certification, personal injury actions generally are not, due to myriad plaintiff-specific distinctions in medical condition, illness, exposure, personal facts including age and lifestyle, and damages. *See In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa.

injury and property damages tolling is well-grounded and supported by California precedent.[11]

Petitioners cannot avoid the on-point *Bell* holding by dismissing it as "pure dicta." Dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundation of the holding, that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). In fact, the *Bell* court's decision that a Texas court would not apply class action tolling was an alternative holding. *See* 899 S.W.2d at 757. The tolling issue was thoroughly considered and had the benefit of full briefing.[12]

1980); *Becker v. McMillin Constr. Co., Inc.*, 277 Cal. Rptr. 491 (Cal. Ct. App. 1991).

[11] While property damages claims may appropriately be subject to class action tolling, mass tort personal injury claims are not—due to differences in the notice afforded to defendants when a class action is filed as to individual plaintiffs' particularized claims. *See Becker*, 277 Cal. Rptr. at 496. The *Becker* court distinguished personal injury claims and explained why, for those claims, a tolling argument could not be sustained:

> As to the personal injury claim, it is clear that *Jolly* controls: the same causation and damages variables as to various plaintiffs' medical histories and injuries make a finding of 'common questions of law and fact' impossible, and the giving of any meaningful notice of the substantive claims to defendants doubtful. Similarly, it would be difficult for the defendant to identify the 'number and generic identities' of potential plaintiffs.

277 Cal. Rptr. at 496 (citation omitted).

[12] *See* Brief for Appellants, *Bell v. Showa Denko K.K.*, 899 S.W.2d 749 (Tex. App.—Amarillo 1995, *writ* denied). Indeed, the *American Pipe* issue was argued by Bell in her futile writ for certiorari to the Texas Supreme Court. The Vaughts cannot complain about the adequacy of the briefing as their co-counsel at the trial court level, Kathleen Robbins, Esq., was one of Bell's co-counsel.

B. Other L-Tryptophan Cases Support The *Vaught* Result.

In *Whall v. Showa Denko K.K.*, No. 635307 (Cal. Super. Ct. Oct. 20, 1993),[13] the court rejected plaintiffs' argument that *American Pipe* tolling should apply to an L-Tryptophan case. Citing *Jolly*, the court ruled that in mass personal injury tort actions, including the L-Tryptophan cases, given concerns of fairness of notice to defendants, "the tolling principles of *American Pipe* . . . will not apply." *Whall*, slip op. at 1-2.

Petitioners rely, as below, on an L-Tryptophan case in New Mexico Federal District Court, *Kennedy v. Showa Denko K.K.*, which applied equitable tolling based on an "Erie guess" as to the applicability of *American Pipe* under New Mexico law. (*See* Pet. App. at 41-60.) Petitioners' reliance on *Kennedy* is misplaced. First, *Kennedy* recognizes that "[a] federal court sitting in diversity must apply the law of the state in which it sits." (Pet. App. at 52 (citations omitted).) In his decision to apply *American Pipe*, Judge Mechem seems to have been unaware of relevant precedent. Judge Mechem did not discuss *Whall* and *Bell*. He ignored the notice requirement that was central to the Supreme Court's analysis in *American Pipe*.[14] *Kennedy* does not support Petitioners' position because it recognizes that a federal court must apply state statute of limitations law including tolling. In Texas, unlike New Mexico, the state court of appeals has addressed the issue

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[13] This decision has not been reported and it is not available via Westlaw or LEXIS. Copies have been lodged with the Clerk of this Court.

[14] Judge Mechem mistakenly relied on *Becker* as extending class action tolling to mass tort actions, although as noted above the *Becker* court followed *Jolly* recognizing that mass *personal injury* actions are not suitable for class action tolling. The *Becker* court distinguished *property damage* claims from personal injury mass tort claims because "the identity and number of potential claimants were sufficiently ascertainable [in *Becker*] to notify defendant of all potential claims within the limitations period." *Becker*, 277 Cal. Rptr. at 496.

of class action tolling and does not allow tolling in mass personal injury actions.

In another L-Tryptophan case, not cited by petitioners, *Barela v. Showa Denko K.K.*, No. Civ. 93-1469, 1996 U.S. Dist. LEXIS 7830 (D.N.M. Feb. 28, 1996), the court held *American Pipe* did not apply. First, New Mexico (like Texas) has no compelling interest in furthering the economy and efficiency of a federal court sitting in another state that would override the local statute of limitations and the forum state's interest in protecting against stale claims. *Barela,* 1996 U.S. Dist. LEXIS 7830 at *14-*16. It would be novel and erroneous for a court sitting in New Mexico (or Texas) to adopt *American Pipe* to toll its own statute of limitations based on a class action filed in a foreign jurisdiction. *See Barela,* 1996 U.S. Dist. LEXIS 7830 at *16. Judge Hansen held that *American Pipe* tolling should not apply to mass personal injury tort cases such as the L-Tryptophan cases where the class action did not give defendants adequate notice of individual claims. *See Barela,* 1996 U.S. Dist. LEXIS 7830 at *16-*17 (citing *Bell* and *Jolly*).

As the district court observed in *Barela,* "the federal interests encountered in *American Pipe* are not as strong when a federal court sits in diversity." 1996 U.S. Dist. LEXIS 7830 at *15 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 213). The court followed *Carter v. Washington Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985), in determining that there is "no remotely compelling federal interest in overriding the local statute of limitations" in personal injury suit between private parties. *Barela,* 1996 U.S. Dist. LEXIS 7830 at *15-*16. The *Barela* court concluded: "This Court does not believe that any overriding federal interest in class actions mandates application of *American Pipe* in diversity cases in the absence of applicable state tolling law." *Barela,* 1996 U.S. Dist. LEXIS 7830 at *16.

The underlying rationale of *American Pipe*—the federal interest in the federal class action statute and prevention of a multiplicity of actions in federal court—does not apply to a personal injury suit filed in state court by a Texas resident. There is no reason why the pendency of a petition for class certification filed by a Maryland resident in Maryland should outweigh Texas' strong interest in preventing the assertion of stale claims. Otherwise Texas' statute of limitations would be disregarded and subject to indefinite extension whenever a class action in an arguably related matter was filed anywhere in the country, without regard to whether or not the class action was filed in good faith or actively pursued.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

SARA D. SCHOTLAND
Counsel of Record
CLEARY, GOTTLIEB, STEEN
& HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

ROWLAND FOSTER
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300

Attorneys for Respondents
Showa Denko K.K. and Showa Denko America, Inc.